Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RICHARD MILONE,

Petitioner,

v.

ALTHEA CAMP, WARDEN, GRAHAM CORRECTIONAL CENTER, ILLINOIS DEPARTMENT OF CORRECTIONS,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a habeas Petitioner's newly discovered evidence, discovered long after state rules permitted such to be presented to it, establishing his "actual innocence," is properly limited solely to its bearing upon the constitutionality of the Petitioner's conviction rather than requiring issuance of the writ.

2. Whether an evidentiary hearing should be required in any case in which a habeas Petitioner has made a credible claim that newly discovered evidence would exonerate him.

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ALTHEA CAMP, WARDEN, GRAHAM CORRECTIONAL CENTER, ILLINOIS DEPARTMENT OF CORRECTIONS,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Richard Milone prays that a writ of certiorari will issue to review the judgment of the courts below, which denied him habeas corpus relief from a sentence of 90 to 175 years imposed for a crime he did not commit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is published as *Richard Milone v. Althea Camp, Warden*, 22 F.3d 693, 1994 U.S. App. LEXIS 8410, and is attached in the Appendix to this petition at App. 1. The decision of the United States District Court for the Northern District of Illinois is unpublished but appears as 1992 U.S. Dist. LEXIS 14615 (1992) and is attached in the Appendix at App. 21.

JURISDICTION

The decision and judgment of the Court of Appeals was issued on April 21, 1994. This Petition is being filed within 90 days of the decision date.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This case also involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves 28 U.S.C. § 2254(d) which requires deferential treatment of state court findings if the determination was made after a hearing resolving "the merits

of the factual dispute" and there are "reliable and adequate written indicia" of that finding and requires no such deference where the findings are not fairly supported by the record.

STATEMENT OF THE CASE

The decision below affirmed the summary dismissal of Petitioner's first federal habeas corpus petition on the merits of his custody, which alleged that his constitutional rights were denied at his trial, that he was actually innocent and that newly discovered evidence proved that a serial murderer, Richard O. Macek, committed the crime for which he was convicted and sentenced to 90 to 175 years in prison.

1. Trial, Appeal and Federal Habeas Proceedings

On August 2, 1973, Petitioner was convicted at a bench trial in DuPage County, Illinois of the murder of a young girl, Sally Kandel. He was sentenced to 90 to 175 years in prison, and served his sentence for almost twenty years until his parole in late 1992. His conviction was affirmed on appeal. *People v. Milone* (2d Dist. 1976), 43 Ill.App.3d 385, 356 N.E.2d 1350. Petitioner filed his petition for writ of habeas corpus and supporting exhibits with the district court on December 4, 1985. The case was assigned to then District Court Judge Susan Getzendanner. On June 20, 1986, Respondent's motion to dismiss for failure to exhaust state remedies was granted.

On August 13, 1986, the district court ruled that it would permit Petitioner to file an amended petition presenting only exhausted claims. The court stated in pertinent part:

> "Petitioner . . . urges this court to relax the "rigorous" total exhaustion requirement because another person has confessed to the crime for which petitioner was convicted. This court is well aware of the *strong possibility that petitioner is factually innocent of his crime.* See Chicago Tribune, sec. 3, p. 2 (July 1, 1986) (extensive, newly discovered and unopposed evidence of petitioner's innocence and another person's guilt was presented at petitioner's prison review board hearing on motion for an unconditional pardon.) As explained previously, federal habeas corpus relief is not available to correct errors in a trial court's factual determinations of guilt. Habeas relief is available only to correct errors (usually of a constitutional nature) in a trial court's process for determining guilt and detention. See *Townsend v. Sain*, 372 U.S. 293, 317 (1963). *Thus, evidence of petitioner's factual innocence is not itself grounds for habeas relief, let alone grounds to relax the total exhaustion rule.* Petitioner's lawyer would do better to expedite the available state remedies for release of petitioner on the grounds of his factual innocence, such as executive pardon or Ill.Rev.Stat. ch. 110, ¶ 12-1401 ("Relief from Judgments), rather than seek federal habeas relief. * * * " (Emphasis supplied)

On August 25, 1986, the court granted Petitioner leave to file an amended petition raising only exhausted claims which was filed on September 15, 1986. Respondent filed her answer on October 6, 1986.

On November 17, 1986, the parties entered into an agreed stay of proceedings while Petitioner's clemency hearing went forward. The Governor's Office obtained the original trial transcript from the Clerk of the Circuit Court of DuPage County, Illinois through its agent, Richard Tetyk. On March 11, 1987, Petitioner filed a motion suggesting the death of a material witness, Richard Otto Macek, the person who had repeatedly confessed to

the murder of Sally Kandel. On September 25, 1987, the case was transferred to Judge Plunkett on Judge Getzendanner's resignation from the bench.

On February 12, 1988, in light of new authority from the Supreme Court on the consequences of a colorable showing of factual innocence, (*Murray v. Carrier, infra*), Judge Plunkett permitted the briefing of all issues, both exhausted and unexhausted.

On March 18, 1988, Petitioner filed his motion for leave to file discovery, for an evidentiary hearing, and memorandum in support of discovery. These motions were denied by Judge Marovich, who was assigned to the cause on May 5, 1988. The cause was essentially thereafter held in abeyance until October 11, 1989, when Petitioner received leave to file the statement of Governor Thompson of Illinois denying Petitioner an unconditional pardon because of private scientific opinions as to the bite mark evidence, opinions to this date never made public nor set forth in any scientific journal for review, criticism or comment.

On December 7, 1989, Judge Marovich referred discovery issues to Magistrate Judge Lefkow. On March 15, 1990, the magistrate granted Petitioner leave to take discovery excepting the deposition of then Governor James Thompson and those persons assisting in the clemency decision. The state court trial transcript was not introduced before the District Court as it had become misplaced by the Governor's Office.

On November 26, 1991, Petitioner filed his memorandum in support of issuance of the writ. On September 29, 1992, the court granted Respondent's motion to dismiss the petition for writ. Shortly after oral argument before the Court of Appeals, counsel for Petitioner was informed

by the Attorney General's office that the state court trial record had been located. It was unavailable for any of the proceedings below. Petitioner is presently on parole.

2. The Factual Allegations Of The Petition

Sally Kandel was murdered on September 12, 1972 on a misty, rainy and foggy night. Visibility was limited. It was stipulated at trial that at 6:15 p.m. Richard Milone, a 19-year-old supervisor at the DC Warehouse in DuPage County, left work for dinner and returned to work at 7:30 p.m.

On the morning of September 13, 1972, after an all night search, the body of 14 year-old Sally Kandel was found in a muddy corn field. She had been bludgeoned to death by a blunt instrument. Her body bore a bite mark on the right thigh. Symmetrical slits were cut into her eyelids. Her thumb was severed. She had numerous injuries to her hands from attempting to ward off her attacker. A piece of metal tubing with blood and hair matching that of the victim was found approximately 16 feet from the body.

The crime made headlines in local and Chicago newspapers and was covered by the media. A series of killings of young women had occurred (and would continue after Petitioner's conviction and incarceration) in the area. The murder of Julie Kathleen Morecroft had occurred in June of 1972. The public reaction was one of outrage. The pressure for an arrest and conviction was overwhelming.

Between September 13, 1972 and January 25, 1973, police continued the murder investigation with an increasing lack of success. They had placed Richard Milone under surveillance after a co-worker, Bernard Swartz, claimed he recognized the metal tubing as a broken-off shopping cart

handle like those used at DC Warehouse. Swartz said Milone had a cart handle. Other evidence was that Milone was seen throwing away something similar to the handle in the days before the Kandel murder.

The parents of Sally Kandel, in collaboration with the prosecution and with officials of their village, set up the "Sally Kandel Reward Fund." Over $20,000 was pledged for information leading to the arrest and conviction of the murderer of Sally. A young girl who lived near the corn field where Sally Kandel's body was found, nine-year old Linda Sue Roseboom (now Goodyear) testified at trial that she saw a man with long sideburns in a light colored car the night of the murder. She identified a different make of car than Petitioner's and did not identify Petitioner. As her later statements revealed, she later positively stated that Petitioner was not the man driving the car that pulled into her driveway the night of Sally Kandel's murder. It was later discovered that the parents of Sally Kandel made two payments to Linda Sue of $900 and $600 to guarantee her cooperation.

Amazingly, the same state appellate court opinion found by the Court of Appeals to be entitled to "deference" pursuant to 28 U.S.C. § 2254(d) stated that this testimony:

> "accurately described the car driven by the defendant, and her observation that the driver had very long sideburns is consistent with defendant's appearance on the evening of the murder. *This evidence alone is sufficient to support the trial judge's finding.*" (43 Ill.App.3d 385, 399) (emphasis added).[1]

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[1] The Court of Appeals deals with this "unreliable finding," by instead agreeing with the state that "the trial judge obviously discounted this evidence." (Slip op. p. 12.) However, the transcript of the state court trial was "lost" after being removed from the possession of the Governor's Office and never returned and thus the trial court's reaction could not be gauged.

Richard Milone became a suspect because of statements of his co-workers at the DC Warehouse that he had a piece of metal tubing in his car. Petitioner stated that he carried a metal bar in his car but had disposed of it in the presence of James Twomey. One of the world's foremost forensic fingerprint experts, Andre A. Moenssens, wrote to defense counsel that he believed that a latent thumb print on the handle of the tubing could not have been made by Petitioner and later he positively so stated. Petitioner remained under constant surveillance from September 14, 1972 to January 24, 1973, when he was arrested. At no time did he perform any incriminating act so as to cause suspicion to focus on him. That he had a suspended driving license caused him to give conflicting accounts of his whereabouts on the evening of September 12, 1972. He did not have the assistance and advice of counsel during this interrogation.

The focus of the prosecution's case was the bite mark on the right thigh of Sally Kandel. In January of 1973, Sergeant Wilson telephoned Dr. Lester Luntz of Hartford, Connecticut. Luntz was a self-proclaimed forensic dentist with no previous experience as an expert in bite mark comparisons. Luntz was asked to testify on behalf of the prosecution that Milone made the bite on Sally's thigh. Without first examining Petitioner or the victim, and for a substantial advance fee ($20,000), Luntz agreed to testify for the prosecution. He studied bite marks on his air flight to Chicago in January, 1973 by having stewardesses on his flight bite their arms.

Dr. Luntz examined Petitioner's mouth and teeth and made impressions. Immediately upon delivering his opinion, Petitioner was arrested for the murder. Petitioner's trial was based solely upon circumstantial evidence, including the first use of bite mark comparisons in Illinois. His

attorney, William Martin, advised Milone to waive a jury trial, advising Milone and his parents that if a finding of guilty was entered at a bench trial, Petitioner's chances of a reversal on appeal would be certain.

The testimony of the prosecution's witnesses at trial was contaminated by the Sally Kandel Reward Fund, the existence of which was unknown to the defense but was known to the witnesses, who were told that the amount of reward would be determined by the impact of the trial testimony given. Petitioner's co-workers retrieved memories that had been lost; one, James Twomey, had his pending criminal charges dropped by the prosecution. A week after the crime, Bernard Swartz from the DC Warehouse recognized the metal tubing as a broken off shopping cart handle. He alleged that Petitioner possessed one. Petitioner stated that he had carried one but disposed of it days before the crime. Four such handles were in evidence at trial.

At trial the prosecution called 39 witnesses. The defense called four forensic experts with wide experience in forensic odontology in sharp contrast to the self-proclaimed expertise of Dr. Luntz and his colleagues.

Defense counsel did not call any lay witnesses available and known to them nor some twenty character witnesses able to testify to Richard Milone's good character and standing as a law abiding citizen.

Nancy Lossman was discovered murdered two years *after* the Kandel murder, a year after Milone's conviction and incarceration. She had been bitten on the breast and the bite mark was identical to that found on Kandel's thigh. Richard Macek was later arrested for the Lossman murder and confessed to it. He was wearing dentures, having had all of his teeth pulled shortly before his ar-

rest. Macek, on his arrest, told McHenry County authorities about the Kandel murder, wrote a confession in long hand (attached to the Milone Petition), and confessed to other murders, including that of Paula Cupit at a Wisconsin resort.[2]

The Court of Appeals panel, rather than resolve which standard of review applies to claims of "actual innocence," (Slip op. pp. 9-10), found it "more efficient to review all of Milone's constitutional claims . . . ." finding them "without merit." (Slip op. p. 10) In addition, they held that under *Herrera v. Collins*, 113 S.Ct. 853 (1993), those cases "tending to show innocence is grounds for the issuance of the writ if the evidence is so strong that it would probably lead to an acquittal upon retrial" do not survive. (Slip op. p. 8.) Consequently, the Court of Appeals took "Milone's newly discovered evidence into account only insofar as it [bore] upon his constitutional claims." (Slip op. p. 10.)

REASONS FOR GRANTING THE WRIT

1.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHAT RELIEF IS AVAILABLE TO A HABEAS PETITIONER WHO ESTABLISHES HIS OR HER "ACTUAL INNOCENCE."

Both the district court and the court of appeals decided the major claim presented by Petitioner as to what consequences flow from a showing that he was "actually in-

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[2] Unlike Missouri, (see *Schlup v. Delo*, petition for certiorari, p. 6, n. 2), Illinois has a short time period for presenting newly discovered evidence, which expired before Petitioner had discovered the Macek confessions. 735 ILCS 5/2-1401.

nocent" of the crime charged that habeas relief could not be awarded for "free-standing" claims of actual innocence.

In the case at bar, the Seventh Circuit Court of Appeals was "sympathetic" to Petitioner's position that the writ be awarded (Slip op. p. 19), and that "[i]t is difficult to adhere to the policy [that actual innocence itself is not a ground for habeas relief] in a case such as this, where Milone has made a credible claim that newly discovered evidence would not only cast a doubt upon his guilt but in fact would exonerate him." *Id.*

There is a division among the circuits on this important question, as noted by the panel opinion here:

> "Many federal courts have concluded that innocence alone is not cognizable as a constitutional claim. See, *e.g.*, *Spencer v. Murray*, 5 F.3d 758, 765 (4th Cir. 1993), certiorari denied, 114 S.Ct. 1208; *Ellis v. Collins*, 956 F.2d 76, 78-79 (5th Cir. 1992), certiorari denied, 112 S.Ct. 1285; *Swindle v. Davis*, 846 F.2d 706, 707 (11th Cir. 1988) (per curiam). Some courts, however, have suggested—apparently on due process grounds—that newly discovered evidence tending to show innocence is grounds for the issuance of the writ if the evidence is so strong that it would probably lead to an acquittal upon retrial. See, *e.g.*, *Jeffries v. Blodgett*, 5 F.3d 1180, 1187-1188 (9th Cir. 1993), certiorari denied, 1993 WL 531701 (Mar. 21, 1994); *Lewis v. Erickson*, 946 F.2d 1361, 1362 (8th Cir. 1991).* * *" (Slip op. p. 8.)

The court below ruled that the question has been decided by this Court's recent decision in *Herrera v. Collins*, 113 S.Ct. 853, 862 (1993). But this misreads that case. All it held was that "executing the innocent is inconsistent with the Constitution." See concurring opinion of Justice O'Connor, 113 S.Ct. at 874.

The "Great Writ" extends to all " 'persons whom society has grievously wronged' in light of modern concepts of justice." *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (plurality opinion) (quoting *Fay v. Noia*, 372 U.S. 391, 440-41 (1963). The statute itself provides that: "The court shall . . . dispose of the matter as law and justice require." 28 U.S.C. § 2243.

The case at bar presents the very "prototypical example of "actual innocence" described by the Chief Justice in *Sawyer v. Whitley*, 112 S.Ct. 2514, 120 L.Ed.2d 269, 280-281 (1992):

> "A prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime. * * *[I]n rare instances it may turn out later, for example, that another person has credibly confessed to the crime, and it is evident that the law has made a mistake. In the context of an noncapital case, the concept of 'actual innocence' is easy to grasp."

Granting of the writ should not be limited on a showing of 'actual innocence' predicated upon newly discovered evidence[3] to merely a "gateway" to have otherwise barred constitutional claims considered on the merits.

Here, Petitioner argued that the key evidence against him at his state criminal trial was unreliable, that there were not even bite mark evidence standards in existence until 1986, and that the bite mark evidence adduced by Petitioner at his clemency hearing in 1986, thirteen years

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[3] The Court of Appeals conceded that much of Petitioner's evidence was discovered after his appeal was decided, including all evidence concerning Richard O. Macek, the serial murderer who confessed to killing Sally Kandel among the numerous young women he butchered.

after the original trial, and especially the computer-enhanced evidence of Dr. Homer Campbell, overwhelmingly supported Petitioner's innocence while demonstrating that the bite mark on Sally Kandel matched Richard Macek. Indeed, the bite mark testimony in Petitioner's case has been the subject of examination in learned treatises: A. MOENSSENS, F. INBAU AND J. STARRS, SCIENTIFIC EVIDENCE IN CRIMINAL CASES, p. 759 (3D ED. 1986) ("[M]any of [the scientists] expressed unabashed astonishment that a fact finder could possibly have believed that the defendant's identity had been positively established by the bite mark, upon the evidence presented.")

Further, Petitioner demonstrated that another man, Richard O. Macek, had confessed, repeatedly, to the murder of Sally Kandel. Macek was in the vicinity of the crime on the night it occurred. He was driving a car similar in color to that described by Linda Sue Roseboom. And his bite matched that on the other victims.

The state has argued that Macek recanted his confessions but it is a matter of record that his confessions were to the McHenry County, Illinois State's Attorney while negotiating a plea of guilty to the murder of another young woman, Nancy Lossman, and to his prison psychiatrist, while the purported recantations, several years later, were not "public."

Petitioner also demonstrated that there was not enough time for him to have committed the offense.

Despite the foregoing, the district court granted the state's motion to dismiss the petition and the Court of Appeals affirmed.

Since *Fay v. Noia*, 372 U.S. 391, 415-17 (1963), this Court has been limiting the scope of the writ. However, those

limitations on habeas review derived from principles of comity and federalism and finality,[4] are excused "where a convicted defendant makes a colorable showing . . . of innocence." Henry J. Friendly, IS INNOCENCE IRRELEVANT: COLLATERAL ATTACK ON CRIMINAL JUDGMENTS, 38 U.CHI. L.REV. 142, 156 (1970). Thus, in *Murray v. Carrier*, 477 U.S. 478, 495, this Court held: "In appropriate cases 'the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration.' " And, in *McClesky v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 1468-69 (1991), this Court stated that "actual innocence" provides "an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty." *See Kuhlman v. Wilson*, 477 U.S. 436, 453-54 (1986) and *Engle v. Isaac*, 456 U.S. 107, 127-28 (1982).

This Court should grant the petition to decide whether or not a "free standing" claim of actual innocence provides a basis for federal habeas review. To hold that it does not, denigrates the writ: the "central mission of the Great Writ should be the substance of "justice," not the form of procedures." (Stevens, Justice, concurring, *Murray v. Carrier*, 477 U.S. 476, 500 (1986).)

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[4] "The high costs of collateral review influence the proper scope of that enterprise." *Reed v. Clark*, 984 F.2d 209, 211 (7th Cir. 1993).

2.

CERTIORARI SHOULD BE GRANTED TO DECIDE IF A HABEAS PETITIONER WHO PRESENTS A CREDIBLE CLAIM THAT NEWLY DISCOVERED EVIDENCE WOULD EXONERATE HIM SHOULD BE ENTITLED TO AN EVIDENTIARY HEARING.

For many of the same policy reasons raised above and reasons of fundamental fairness, this Court should grant certiorari to determine if a prophylactic rule requiring a district court to conduct an evidentiary hearing in those few cases where a habeas Petitioner, as here, presents a credible claim that newly discovered evidence would exonerate him, especially where the Petitioner resides in a state with narrow limits to the presentation of newly discovered evidence.[5]

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[5] As Judge Getzendanner set forth in her opinion in this cause, reported at 643 F. Supp. 679 (N.D.Ill. 1986), Petitioner presented the following claims which she denied for failure to exhaust and which Judge Marovich denied as meritless without holding an evidentiary hearing: "(1) The prosecutors engaged in intentional misconduct by knowingly using perjured testimony, by knowingly suppressing exculpatory evidence, and by paying the state's witnesses so as to bias them in the state's favor [the Kandel Reward Fund]; (2) inflammatory publicity denied Milone a fair trial; (3) Milone was subject to an illegal search and seizure; (4) incompetent evidence was used at trial; (5) the evidence was insufficient to establish guilt beyond a reasonable doubt; (6) Milone did not receive effective assistance of counsel; (7) another person has confessed to the crime . . . ; (8) a crucial state's witness [Linda Sue Roseboom] has, since the trial, recanted her testimony . . . ." Petitioner was given leave to proceed on his "exhausted" claims and the "unexhausted" claims were permitted to be refiled by Judge Plunkett.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-3742

RICHARD MILONE,

Petitioner-Appellant,

v.

ALTHEA CAMP, WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 10098—**George M. Marovich**, *Judge.*

ARGUED FEBRUARY 14, 1994—DECIDED APRIL 21, 1994

Before CUMMINGS, BAUER and COFFEY, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This is an appeal from the denial of a writ of habeas corpus. The Court has jurisdiction over the appeal pursuant to 28 U.S.C. §§ 1291 and 2253. Because petitioner has not demonstrated that any constitutional error infected his state court trial, the dismissal of his petition is affirmed.

Background

On August 2, 1973, petitioner Richard Milone ("Milone") was convicted at a bench trial in DuPage County, Illinois of the murder of Sally Kandel, a fourteen-year-old girl who

had been found dead in a cornfield on September 13, 1972, apparently bludgeoned to death early the previous evening.[1]

Milone appealed his conviction to the Illinois Appellate Court, which affirmed. *People v. Milone*, 43 Ill. App. 3d 385 (2d Dist. 1976). That opinion[2] detailed the evidence presented against him at trial (43 Ill. App. 3d at 386-389):

> 1) *The murder weapon.* A Jewel shopping cart handle, later determined to be the murder weapon, was found near Sally's body on the morning that the murder was discovered. Suspicion focused on the employees of D-C Warehouse in Addison, Illinois when the shopping cart handle was positively matched to one of the carts used to transport inventory there. When Milone, an employee of D-C Warehouse, was first interviewed by detectives he denied knowing when or how the handle was removed from the premises. Confronted by contrary statements from his co-workers, Milone later admitted that he had removed the handle from the cart and carried it in his car for protection, but maintained that he had thrown it away in a park two days before the murder. Testimony from the co-workers at trial confirmed that Milone had been seen with the handle in his car and that he had carried it into a park two days prior to the murder, but they could neither confirm nor deny that he had thrown it away.
>
> 2) *Opportunity.* An autopsy of Sally's body revealed that death occurred within two hours of her dinner at 5:15 p.m. on September 12. During his first interview with detectives Milone stated that he left work

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[1] Milone was recently paroled after serving almost 20 years of a sentence of 90 to 175 years in prison.

[2] Findings of fact made by a state appellate court are afforded the same presumption of accuracy as findings made by a state trial court. *Lewis v. Huch*, 964 F.2d 670, 671 (7th Cir. 1992). In this case the Court must rely on the Illinois Appellate Court opinion because the trial record has been lost.

around 5:30 or 6:00 p.m. the night of the murder; a few days later he said that he had worked until 7:30 or 8:00 p.m. that same evening; another time he said that he had left work for about an hour and a half on September 12 in order to get dinner. One co-worker testified at trial that Milone had left work at around 6:00 p.m. on September 12, and that he had given Milone $5.00 so that Milone could get him a sandwich. He next saw Milone at 7:21. Milone did not have the sandwich. He explained that he had been unable to stop for food because he was busy eluding Addison police who had spotted and chased him because they knew he was driving on a revoked driver's license. At trial Milone stipulated that no such chase had in fact occurred. Another co-worker testified that Milone's car was not in the warehouse lot at 6:00 p.m. the evening of the murder, and that he observed Milone drive up at around 7:20, with combed hair and wearing a different shirt than he had been wearing earlier in the day, looking "cleaned up."

3) *Linda Roseboom's testimony.* Nine-year-old Linda Roseboom testified at trial that she lived next to the cornfield where Sally's body was found. Between 6:00 and 7:00 p.m. on September 12 she observed a light-colored car with front end damage on the driver's side pull into her driveway and turn around. She saw that the driver was a white male with very long sideburns. According to the Illinois Appellate Court opinion, the record showed that on the evening of the murder Milone wore his sideburns quite long and that he drove a beige 1964 Dodge with damage at the front end on the driver's side. When the police examined the car there was no evidence of the crime, but the front seat and the carpet had recently been scrubbed with soap and water.

4) *Bite mark evidence.* Sally's body had been mutilated after her death. In addition to severe head injuries, skull fracture, and laceration of the brain,

> resulting from the fatal beating, and injuries to the hands—including a traumatic amputation of the left thumb and fractures to several fingers, apparently sustained when Sally attempted to ward off the blows to her head—the autopsy revealed that two lacerations, one in the eyelid of each eye, had been symmetrically carved with a sharp instrument after Sally's death. A human bite mark was also discovered on the inside of Sally's right thigh, inflicted some time after death. Dental impressions were taken of Milone's teeth and mouth, and at trial much evidence was adduced by both sides concerning whether Milone's dentition matched the bite mark.

In his state appeal Milone contended, first, that the dental impressions taken from his mouth pursuant to a search warrant were seized in violation of his constitutional rights, second, that the scientific evidence advanced at trial suggesting that his dentition matched the bite mark found on Sally's thigh was not proven to be sufficiently reliable to permit its admission, and third, that the prosecution had not proven his guilt beyond a reasonable doubt. 43 Ill. App. 3d at 386. The court rejected these arguments and affirmed the judgment. The Illinois Supreme Court denied leave to appeal, and no petition for a writ of certiorari to the United States Supreme Court was filed.

In 1986—ten years after his state court appeal—Milone petitioned the federal district court to issue a writ of habeas corpus. That court, through Judge Getzendanner, initially granted the state's motion to dismiss on the ground that Milone had failed to exhaust his state remedies in regard to several of the issues raised in his petition. *United States* ex rel. *Milone v. Camp*, 643 F. Supp. 679 (N.D. Ill. 1986). The court believed that Milone could file an amended petition presenting only exhausted claims to the federal court while simultaneously pursuing his unexhausted claims in state court, without running the risk of being charged with abuse of the writ should he subsequently file a second petition regarding the latter claims. R. 39, interpreting *Rose v. Lundy*, 455 U.S. 509.

Milone thereupon filed an amended petition raising only the issues he had previously presented to the Illinois Appellate Court. R. 51. The parties then agreed to stay the federal proceedings while Milone pursued, not the state post-conviction relief addressed by the district court in its evaluation of his unexhausted claims, but rather executive clemency. R. 61. Clemency was not granted. R. 104. The district court, however, through Judge Plunkett, next allowed Milone to present all of the claims made in his original habeas petition, unexhausted as well as exhausted, on the ground that intervening Supreme Court doctrine suggested that Milone had made a good case for relaxation of the total exhaustion rule. R. 73, 77. Discovery was allowed; depositions were taken. In September 1992 the district court, through Judge Marovich, granted the state's motion to dismiss the petition. This appeal followed.

The district court's conclusions of law are reviewed *de novo*. *Quinn v. Neal*, 998 F.2d 526, 528 (7th Cir. 1993). Federal courts can grant habeas relief only when there is a violation of federal statutory or constitutional law, not when there has been error under state law. See, *e.g.*, *Brewer v. Aiken*, 935 F.2d 850, 854-855 (7th Cir. 1991). State court findings of historical fact are presumed to be correct, 28 U.S.C. § 2254(d), but "questions of law or mixed questions of law and fact lack that presumption" and are reviewed *de novo*. *Brewer v. Aiken*, 935 F.2d at 855. Of course, the *de novo* standard only applies to questions of federal law, not to purely state-law matters. See, *e.g.*, *Wainwright v. Sykes*, 433 U.S. 72, 81.

Milone urges the Court to apply a *de novo* standard of review to many of the factual findings described in the Illinois Appellate Court opinion on the ground that his assertions of constitutional error present "mixed questions of law and fact." The force of this reasoning is unclear. This Court will apply a *de novo* standard to Milone's assertions of constitutional error, of course, but it may not revisit Illinois fact-finding absent a showing—which Milone

has not made—that error of the type described in 28 U.S.C. § 2254(d) infected the state court proceedings.[3]

Analysis

Milone's arguments to this Court center around the claim that he is actually innocent of the crime of which he was convicted. This opinion will first address the effect of a claim of actual innocence on habeas corpus review of state proceedings, and then it will discuss the merits of Milone's constitutional arguments.

A. Actual Innocence

The parties are unclear as to the effect of a claim of actual innocence on habeas proceedings. Milone urges this Court to take such a claim into account as it examines the record for evidence of unconstitutionality in the state court proceedings. That would be impermissible.

A claim of actual innocence is relevant to determining whether a habeas corpus petition may be brought before a federal tribunal at all; it is not ordinarily cognizable in determining whether the writ should issue. Generally, before a federal court will entertain a habeas petition, the petitioner must meet certain procedural requirements. Among these is the requirement that the petitioner has presented to the state courts all of the claims contained in his habeas petition. See generally *Rose v. Lundy*, 455 U.S. 509. While "there is a strong presumption in favor of requiring the prisoner to pursue his available state rem-

[3] Milone urges this Court to order the issuance of a writ of habeas corpus but, barring that, he argues that the district court's failure to hold an evidentiary hearing was error. Milone has not demonstrated a defect in state fact-finding such as the ones listed in 28 U.S.C. § 2254(d), nor has he demonstrated that any circumstance discussed in *Townsend v. Sain*, 372 U.S. 293, overruled in other respects by *Keeny v. Tamayo-Reyes*, 112 S. Ct. 1715, is in operation here. It was not error, therefore, for the district court to refuse to hold an evidentiary hearing.

edies," under some circumstances federal courts may relax the total exhaustion requirement. *Granberry v. Greer*, 481 U.S. 129, 131. One of the circumstances upon which the total exhaustion requirement may be relaxed appears to be a "colorable claim," *Kuhlmann v. Wilson*, 477 U.S. 436, 454, by the petitioner that he is actually innocent of the crime for which he was convicted. *Murray v. Carrier*, 477 U.S. 478, 496. In this manner a claim of actual innocence provides "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera v. Collins*, 113 S. Ct. 853, 862.

Once the petitioner has persuaded the federal court to hear his constitutional claims, his guilt or innocence of the crime is relevant only insofar as it bears on a constitutional issue or a matter of federal statutory law. 28 U.S.C. § 2254(a). The Supreme Court appears to be willing to hold that it is unconstitutional to execute a "legally and factually innocent person," *id.* at 870 (O'Connor, J., concurring, joined by Kennedy, J.),[4] while at the same time suggesting that the petitioner's evidentiary burden in such a case "would necessarily be extraordinarily high." *Id.* at 869 (Rehnquist, C.J., for the Court). In this case, however, Milone is not under sentence of death; indeed, he has been paroled from prison. Under these circumstances Supreme Court precedent does not allow a federal court

[4] See *id.* at 869 (Rehnquist, C.J., for the Court) (assuming without deciding that a truly persuasive demonstration of actual innocence might render an execution unconstitutional); *id.* at 870 (O'Connor, J., concurring, joined by Kennedy, J.) (averring that it would be unconstitutional to execute a "legally and factually innocent person"); *id.* at 875 (White, J., concurring in the judgment) (assuming that a persuasive showing of actual innocence would render an execution unconstitutional); *id.* at 876 (Blackmun, J., dissenting, joined in relevant part by Stevens and Souter, J.J.) (averring that it is unconstitutional to execute a person who is actually innocent). But see *id.* at 874-875 (Scalia, J., concurring, joined by Thomas, J.) (suggesting that the Constitution does not forbid the execution of an innocent person).

to issue a writ of habeas corpus only on the ground that Milone is, or might be, innocent of the Kandel murder.[5] Hence this Court may consider Milone's claim of actual innocence only in determining whether to excuse his failure to exhaust all state court remedies before pursuing this habeas petition.

In order to persuade the federal court to consider constitutional claims that it would otherwise be unable to reach, the petitioner must meet a difficult burden: he must either show both cause for the default and prejudice resulting therefrom, or he must show that failure by the federal court to entertain the defaulted claim would result

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[5] In *Townsend v. Sain* Chief Justice Warren noted that "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." 372 U.S. 293, 317, overruled in other respects by *Keeny v. Tamayo-Reyes*, 112 S. Ct. 1715. Many federal courts have concluded that innocence alone is not cognizable as a constitutional claim. See, *e.g.*, *Spencer v. Murray*, 5 F.3d 758, 765 (4th Cir. 1993), certiorari denied, 114 S. Ct. 1208; *Ellis v. Collins*, 956 F.2d 76, 78-79 (5th Cir. 1992), certiorari denied, 112 S. Ct. 1285; *Swindle v. Davis*, 846 F.2d 706, 707 (11th Cir. 1988) (per curiam). Some courts, however, have suggested—apparently on due process grounds—that newly discovered evidence tending to show innocence is grounds for the issuance of the writ if the evidence is so strong that it would probably lead to an acquittal upon retrial. See, *e.g.*, *Jeffries v. Blodgett*, 5 F.3d 1180, 1187-1188 (9th Cir. 1993), certiorari denied, 1993 WL 531701 (Mar. 21, 1994); *Lewis v. Erickson*, 946 F.2d 1361, 1362 (8th Cir. 1991). But see *Swan v. Peterson*, 6 F.3d 1373, 1384 (9th Cir. 1993) (the newly discovered evidence must *both* bear on the constitutionality of the petitioner's conviction *and* be so strong that it probably would lead to an acquittal).

We do not believe that the latter position can survive *Herrera v. Collins*, in which Chief Justice Rehnquist stated for the Court, "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief *absent an independent constitutional violation occurring in the underlying state criminal proceeding.* * * * Few rulings would be more disruptive of our federal system than to provide for federal habeas review of free-standing claims of actual innocence." 113 S. Ct. at 860-861 (emphasis added).

in a "fundamental miscarriage of justice." *Sawyer v. Whitley*, 112 S. Ct. 2514, 2518-2519. If the petitioner is actually innocent of the crime for which he was convicted, it may be a fundamental miscarriage of justice for the federal court not to entertain his constitutional claims. *Id.* at 2519. In this case, Milone raises several issues in his habeas petition that were not presented to any state court. He wishes the Court to excuse his failure to exhaust all of his state remedies on the ground that it would constitute a miscarriage of justice, due to his innocence of the murder, not to entertain his petition. In support of his claim of actual innocence Milone makes the following points:

> 1) The evidence presented at his trial that linked his dentition to the bite mark found on Sally's thigh was unreliable. First, it failed both the *Frye* and the *Daubert* tests of admissibility of scientific evidence because the science of "forensic odontology" was in its infancy at the time of his 1973 trial. Second, expert testimony is now available (and is reliable because the science of forensic odontology has advanced considerably in the past 20 years) tending to show that Milone could not have made the mark found on Sally's thigh. Indeed, the mark on Sally's thigh can now be shown to match the dentition of a known serial murderer, Richard Macek.
>
> 2) Richard Macek confessed to the murder of Sally Kandel several times before committing suicide in his jail cell in 1987. (The parties dispute whether Macek also recanted these confessions.)
>
> 3) Linda Sue Roseboom "reaffirmed her trial testimony" that petitioner's Dodge Polara was not the car that she saw in her driveway the evening Sally Kandel was killed. R. 138 at 19.

The parties disagree as to how convincing Milone's case for actual innocence must be in order to persuade a federal court to excuse his failure to exhaust all state remedies before bringing this petition. Milone argues that he need only demonstrate that "under the probative evidence

he has a colorable claim of factual innocence," *Kuhlmann*, 477 U.S. at 454, quoted in *Sawyer v. Whitley*, 112 S. Ct. 2514, 2519, while the state apparently argues that he must meet a higher burden (Response Br. at 5, relying on *Sawyer v. Whitley*, 112 S. Ct. at 2517).[6]

The Court need not resolve this dispute. In this case it is more efficient to review all of Milone's constitutional claims, which prove to be without merit, than it is to engage in a long analysis of his factual claims under either standard proposed by the parties. Cf. *Strickland v. Washington*, 466 U.S. at 697 (Courts may dispose of a claim of ineffective assistance of counsel on the ground that counsel's performance did not prejudice the defendant, without first inquiring as to whether counsel's performance was deficient.). The remainder of this opinion is premised on the assumption that Milone has made a sufficient showing of actual innocence to warrant habeas review of all of his constitutional claims, unexhausted as well as exhausted.

While considering Milone's constitutional claims this Court may not alter the standards of review discussed above. In particular, while Milone's claim of actual innocence rests in large part upon evidence that only became available after his trial, such newly discovered evidence may not be imparted wholesale into a habeas analysis. This Court may take Milone's newly discovered evidence into account only insofar as it bears upon his constitutional claims. *Herrera*, 113 S. Ct. at 860, quoting *Townsend v. Sain*, 372 U.S. at 317 ("[Newly discovered] evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.").

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[6] See *McCoy v. Lockhart*, 969 F.2d 649, 651 (8th Cir. 1992), for a discussion of this issue.

B. Constitutional Claims

Milone's constitutional claims are as follows:

1) Admission of the bite mark evidence at his 1973 trial violated his right to substantive and procedural due process.

2) There was insufficient evidence at trial to support the conviction.

3) The state failed, in violation of the Fifth, Sixth, and Fourteenth Amendments, to reveal to the defense the existence and details of the so-called "Sally Kandel Reward Fund," the proceeds of which were distributed after trial to several of the prosecution's witnesses.

4) Milone was ineffectively represented when his trial counsel failed to call any character witnesses to testify in mitigation at his sentencing. Additionally, Milone did not knowingly waive his right to allocution, his right to a jury trial, or his right to testify in his own defense.

5) The state's handling of Milone's petition for executive clemency was unconstitutionally deficient.

Milone also argues, first, that he is innocent of the murder of Sally Kandel; second, that Richard Macek committed the murder and that his confessions are probative of Milone's innocence; and third, that Linda Sue Roseboom "reaffirmed her trial testimony" that Milone's car was not the one she had seen in her driveway the night of the murder.

The latter points are not a basis for habeas review. As discussed above, assertions of innocence are not in themselves cognizable constitutional claims, at least in cases like this one where the petitioner is not under sentence of death. Likewise, the confessions of Richard Macek are pressed on appeal only as bearing on the question of Milone's innocence and as such this Court may not consider them in conducting habeas review for constitutional error. Final-

ly, as the state notes in regard to the Roseboom testimony, if she testified at trial that Milone's car was not the one she had seen the night of the murder, then the trial judge obviously discounted this evidence.

The remainder of this opinion addresses Milone's assertions of constitutional error.

1. The bite mark evidence

Milone argues that the science of forensic odontology was in its infancy at the time of his trial and that it was therefore error to admit testimony from the state's expert to the effect that his dentition matched the mark found on Sally's thigh. Milone reasons that such testimony fails both the *Frye*[7] and the *Daubert*[8] tests for the admissibility of scientific evidence in federal courts.

The force of this reasoning is unclear. The admissibility of evidence is generally a matter of state law. See, *e.g.*, *United States* ex rel. *Lee v. Flannigan*, 884 F.2d 945, 953 (7th Cir. 1989), certiorari denied, 497 U.S. 924. In this case, the Illinois Appellate Court held that the state's expert testimony was admissible. Absent a showing that the admission of the evidence violated a specific constitutional guarantee, a federal court can issue a writ of habeas corpus on the basis of a state court evidentiary ruling only when that ruling violated the defendant's right to due process by denying him a fundamentally fair trial. See, *e.g.*, *Haas v. Abrahamson*, 910 F.2d 384, 389 (7th Cir. 1990). The standard, then, is not whether the testimony satisfied the *Frye* or *Daubert* tests—neither of which purports to set a constitutional floor on the admissibility of scientific evidence—but rather is whether the probative value of the state's evidence was so greatly outweighed by its prej-

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[7] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[8] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786.

udice to Milone that its admission denied him a fundamentally fair trial.[9]

It is clear that the probative value of the odontology evidence presented by the state was not so outweighed by its prejudice to Milone as to deny him a fundamentally fair trial. With respect to its probative value, while the science of forensic odontology might have been in its infancy at the time of trial, as Milone asserts, certainly there is some probative value to comparing an accused's dentition to bite marks found on the victim. With respect to the prejudice to Milone caused by the admission of what he claims was unreliable evidence, he had ample opportunity to persuade the trial judge to discount the testimony of the state's expert: Milone was able to cross-examine the state's expert both in regard to his credentials and in regard to the general reliability of the science of bite mark identification, and Milone presented several experts of his own to testify that he could not have made the mark found on Sally's thigh. Accordingly, it was not constitutional error for Illinois to have allowed the admission of the bite mark evidence.

The only other challenge Milone could make regarding the bite mark evidence is a general challenge to the sufficiency of the evidence to support his conviction.

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[9] See, *e.g.*, *Flannigan*, 884 F.2d at 953 (7th Cir. 1989) (applying the "greatly outweighed" balancing test to the admission in state court of prior crimes evidence); *Woodruff v. Lane*, 818 F.2d 1369, 1373 (7th Cir. 1987) (same); *United States* ex rel. *Palmer v. DeRobertis*, 738 F.2d 168, 170, 171 (7th Cir. 1984) (applying the "greatly outweighed" balancing test to the admission in state court of evidence regarding the defendant's flight from arresting officers), certiorari denied, 464 U.S. 924; cf. *Logan v. Lockhart*, 994 F.2d 1324, 1327 (8th Cir. 1993) (asking whether the testimony in state court of a witness who was alleged to have been incompetent to testify was "so grossly unreliable that it infected and fatally undermined the fairness of the trial" (citations and internal quotation marks omitted)), certiorari denied, 114 S. Ct. 722.

2. Sufficiency of the evidence

Due process of law requires that guilt in a criminal proceeding be proved beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364. A federal court engaged in collateral review of a state court conviction must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (emphasis in original). Of course this inquiry is based on the record evidence. *Id.* at 318. In this case to state the standard of review is to dispose of the claim: Mere perusal of the Illinois Appellate Court summary of the evidence adduced against Milone at trial reveals that there was sufficient evidence to support his conviction. He had an opportunity to commit the crime, he was linked to the murder weapon, and evidence was introduced from which a reasonable finder of fact could conclude that Milone was observed near the scene of the murder and that his dentition was linked to the bite mark found on the victim. As Milone himself acknowledges in his brief before this Court (Br. at 20), "issuance of the writ [based on a *Jackson* finding of insufficiency of the evidence] is rare indeed." The evidence presented at Milone's state court trial was sufficient to convict him of murdering Sally Kandel.

3. The Sally Kandel Reward Fund

According to Milone, before he was indicted for Sally Kandel's murder her family established a "reward fund." The parties do not describe the nature and purpose of the fund, but it appears that after Milone's trial Sally's family distributed the fund's proceeds to several of the witnesses who had testified against him. The persons to whom the proceeds were distributed and the amounts of distribution were determined by Sally's family after the trial. Milone argues that this constitutes "deals, promises or inducements" to material witnesses that the state was obligated to disclose to the defense upon request. *United*

States v. Bagley, 473 U.S. 667, 676. Its failure to do so, he claims, mandates a new trial.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. Milone does not suggest that the state itself established or administered the reward fund, nor does he suggest that the witnesses were promised money by Sally's family in exchange for their testimony. Under these circumstances it cannot be said that there is a reasonable probability—that is, one sufficient to undermine confidence in the outcome, *id.*—that, had the defense been aware of the existence of the fund, the result of the proceeding would have been different.

4. Ineffective assistance of counsel and waiver of rights

Milone argues that the assistance of his trial counsel was ineffective in several respects. He also argues that his waiver of allocution, of a trial by jury, and of the right to testify in his own defense, were not knowing and intelligent.

In order to demonstrate ineffective assistance of counsel, Milone must show both that his counsel's performance was deficient and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. at 687. The Court need not address both *Strickland* prongs if it is clear that Milone cannot satisfy one of them: There is no need to discuss prejudice if counsel's performance was not deficient, and there is no need to evaluate counsel's performance if there was no prejudice resulting from counsel's actions. Cf. *id.* at 697. To prove that counsel's performance was deficient the petitioner must show that counsel acted "outside the wide range of professionally competent assistance." *Id.* at 690. "[C]ounsel is strongly presumed to have rendered

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* To prove prejudice the petitioner must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Milone raises several issues in support of his claim of ineffective assistance of counsel. Some of these issues implicate constitutional guarantees in addition to the Sixth Amendment right to counsel.

First, Milone argues that he had twenty-five character witnesses available to testify in mitigation at sentencing, but that his trial counsel inexplicably failed to call them to testify. Because the parties have not suggested that there is any constitutional right to present character witnesses at sentencing, this argument goes only to Milone's ineffective assistance claim. As the district court explained, however, twenty-five people testifying to Milone's good character would not be likely to alter the sentence pronounced by a judge who had just found Milone guilty at a bench trial of a particularly heinous and gruesome murder. For this reason counsel's performance, even if it was deficient, did not prejudice Milone.

Second, Milone argues that he did not knowingly waive his right to allocution. Because there is no constitutional right to testify at one's own sentencing,[10] this argument also goes only to ineffective assistance of counsel. As the state contends, however, it was a reasonable strategy for counsel to refuse to allow allocution by a defendant who

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[10] This proposition follows from *Hill v. United States*, 368 U.S. 424, 426, 428. That case held that failure to allow allocution at federal sentencing, as required by Fed. R. Crim. Proc. 32(a), while reversible error on direct appeal, *Green v. United States*, 365 U.S. 301, 304-305, is not a constitutional error that can be raised by collateral attack under 28 U.S.C. § 2254 or § 2255.

did not admit guilt or offer remorse (Response Br. at 20). For this reason counsel's performance was not deficient.

Milone also argues that, due to his counsel's ineffective performance, his waiver of a jury trial was not knowing and intelligent. Because a trial by jury is a constitutional right (see, *e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 149), which may be waived by a defendant in favor of a bench trial, *Patton v. United States*, 281 U.S. 276, 298, only if the waiver is voluntary and knowing, *Brady v. United States*, 397 U.S. 742, 748, this argument goes both to Milone's Sixth Amendment right to a jury trial and to ineffective assistance of counsel.

With respect to whether Milone's waiver was knowing and intelligent, the burden is upon Milone to demonstrate that his waiver of the right to a jury trial was *prima facie* invalid. *United States* ex rel. *Williams v. DeRobertis*, 715 F.2d 1174, 1178 (7th Cir. 1983), certiorari denied, 464 U.S. 1072. In this case, petitioner admits that either he or his counsel waived a jury trial. R. 138 at 23. He also acknowledges that his counsel advised him to waive trial by a jury because a jury would have difficulty understanding the expert evidence. *Id.* at 24. Thus petitioner has not made a *prima facie* case that the waiver was invalid. Indeed, it appears that Milone "understood that the choice confronting him was, on the one hand, to be judged by a group of people from the community, and on the other hand, to have his guilt or innocence determined by a judge," *Williams v. DeRobertis*, 715 F.2d at 1180, and that for prudential reasons he elected the latter course. "In addition, the fact that petitioner was represented by competent counsel throughout the proceedings further indicates that he knowingly waived his right." *United States* ex rel. *Wandick v. Chrans*, 869 F.2d 1084, 1088. The record indicates that Milone's waiver of the right to a jury trial was knowing and intelligent.

With respect to the ineffective assistance claim, counsel's recommendation to waive a jury trial was a reasonable trial strategy. Counsel's stated concern was that the jury

would have trouble understanding the expert testimony. Under the circumstances counsel's performance was not unconstitutionally deficient.

Finally, Milone notes that he did not testify in his own behalf at trial. This argument goes both to Milone's Fourteenth Amendment right to testify in his own behalf, *Rock v. Arkansas*, 483 U.S. 44, 51, and to ineffective assistance of counsel.

With respect to the Fourteenth Amendment claim, Milone argues that "nowhere in the record is there a suggestion that he knowingly and intelligently waived his constitutional right to testify in his own behalf." R. 138 at 22. The state court had no affirmative duty, however, to determine whether Milone's silence was the result of a knowing and voluntary decision not to testify. *United States v. Brimberry*, 961 F.2d 1286, 1290 (7th Cir. 1992). The fact that the record is barren of evidence in this regard, therefore, does not support an inference that Milone's silence was the product of anything other than a knowing and voluntary waiver. Moreover, as in *Brimberry*, Milone does not allege that he "did not know [he] could testify, that [he] wanted to testify, or that [his] attorney prevented [him] from testifying." *Id.* at 1289. He merely asserts that his attorney advised him not to testify in his own behalf and that he took that advice. Milone has not suggested any reason for a federal inquiry into the circumstances of his waiver.

With respect to the effectiveness of counsel, because Milone contradicted himself numerous times when he was questioned by investigators prior to his arrest, it was reasonable for counsel to avoid subjecting Milone to damaging impeachment by putting him on the stand. Counsel's performance in this regard was not unconstitutionally deficient.

5. The clemency hearing

As the district court correctly held, there is no constitutional right to a clemency hearing, *Herrera*, 113 S. Ct. at 867, and since Milone has not demonstrated any fundamental unfairness in the conduct of this one, there is no ground here for habeas relief.

Conclusion

The Court is sympathetic to Milone's position: If he is indeed innocent of this heinous crime, nothing is more reasonable than to pursue all avenues of possible relief in an attempt to clear his name. However, we are unable to accept Milone's invitation to engage in a broad inquiry into his guilt or innocence. Our interpretation of applicable Supreme Court precedent and of the policies underlying habeas review precludes such a proceeding. First, *Herrera* strongly suggests that actual innocence is not itself a ground for granting habeas relief in anything other than a capital case, 113 S. Ct. at 860, thus implicitly overruling federal cases suggesting otherwise. In addition, a contrary rule would gravely undermine legitimate concerns for federalism and finality by arrogating to federal courts, under the guise of a constitutional claim to substantive due process, the fact-finding function that is generally reserved for state processes.

It is difficult to adhere to the policy in a case such as this, where Milone has made a credible claim that newly discovered evidence would not only cast a doubt upon his guilt but in fact would exonerate him. A rule that would allow Milone to demand federal relief on the facts of this case, however, would necessarily require endless litigation of any and all "free-standing claims of actual innocence," *id.* at 861, no matter how tenuous the foundation, with great detriment to the doctrines regarding proper use of the writ.

Having carefully examined Milone's constitutional claims, it is apparent that no error infected the state court proceedings. The dismissal of Milone's petition for a writ of habeas corpus is affirmed.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: April 21, 1994

BEFORE:

Honorable WALTER J. CUMMINGS, Circuit Judge
Honorable WILLIAM J. BAUER, Circuit Judge
Honorable JOHN L. COFFEY, Circuit Judge

No. 92-3742

RICHARD MILONE,

Petitioner-Appellant

v.

ALTHEA CAMP, Warden,

Respondent-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 85 C 10098, George M. Marovich, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

[Dated September 29, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 85 C 10098

UNITED STATES OF AMERICA
ex rel. RICHARD MILONE,

Petitioner,

v.

ALTHEA CAMP, etc., et al.,

Respondents.

MEMORANDUM OPINION AND ORDER

Richard Milone has petitioned this court for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 et seq. on the grounds that failure to grant a new evidentiary hearing constitutes a fundamental miscarriage of justice. Respondent, Althea Camp, Warden of the Graham Correctional Center of the Illinois Department of Corrections, has moved to dismiss the petition on the grounds that Milone failed to timely file any post conviction relief and that the facts of this case do not constitute a fundamental miscarriage of justice.

BACKGROUND

1) Statement of the Case

When reviewing a motion to dismiss, we assume as true all factual allegations contained in the complaint and make all possible references in favor of the plaintiff. *Gorski v. Troy*, 929 F.2d 1183, 1186 (7th Cir. 1991). On September 12, 1972, fourteen year old Sally Kandel was found dead in a cornfield about two miles from her home. An autopsy performed by Dr. R.N. Horowitz of Central DuPage Hospital listed the cause of death as severe head injuries, comminuted skull fracture, and laceration of the brain. A bar type instrument, later identified as a Jewel shopping cart handle, was found 16 feet from Kandel's body. Examination of blood and hair samples determined that the handle was the murder weapon.

After pictures of the handle were circulated in newspapers and on television, the owner of the D-C Warehouse in Addison, Illinois notified the authorities that a handle similar to the one in question had been missing from one of the shopping carts used to transport inventory in his warehouse. On September 22, 1972, detectives focused their search on the employees of the D-C Warehouse.

Petitioner, Richard Milone worked at D-C Warehouse at the time. Milone's co-workers gave statements to the police which tied Milone to the murder weapon. When confronted with these statements, Milone admitted that he had removed a shopping cart handle from the warehouse cart and carried it around in his car for protection. He maintained that he had thrown the handle away in a park in Lombard two days before the Kandel murder. He admitted leaving the warehouse on the evening of September 12, 1972 for about an hour and a half for dinner at 5:30 or 6:00. Based on an examination of stomach contents,

the autopsy placed the time of death within two hours after Kandel had eaten her dinner at 5:30.

At trial, one co-worker, Bernard Swartz testified that he had seen Milone putting the cart handle in the trunk of his car. Two other co-workers testified that they had seen Milone with the shopping cart handle in the front seat of this car. They also testified that they had seen Milone carry the handle into a park on September 10, but neither could confirm or deny that Milone had thrown the handle away that night as he had alleged. One of the co-workers, John Francioni, also testified that he had given Milone $5.00 to buy him a sandwich on the night of September 12 about 6:00. He did not see Milone again until he punched out at 7:21 that night. When Francioni asked Milone about the sandwich, Milone told him that he was unable to stop for food because he was eluding the Addison police who had spotted and chased him because they knew he was driving on a revoked drivers's license. At trial, Milone stipulated that no such chase took place.

The other co-worker, James Twomey, stated that when he returned to work at 6:00 Milone's car was not in the parking lot. He observed Milone drive into the lot at 7:20 p.m. and noticed that he was wearing a different shirt that he had seen him wearing earlier in the day. He commented to Milone about his "cleaned up" appearance and accused him of going home to change when he should have been helping them at work.

Linda Roseboom, who lived in a farmhouse next to the cornfield where Kandel's body was discovered, testified that on the evening of September 12, 1972 between 6:00 p.m. and 7:00 p.m., she observed a light colored car with front end damage on the driver's side pull into her driveway and turn around. She also observed that the man

driving the car was a white male with long sideburns. The record indicated that Milone drove a beige 1964 dodge which had a damaged front end on the driver's side and that he wore long sideburns. An examination of the car failed to turn up any evidence; however the front seat and carpet had been scrubbed with soap and water shortly before the Sheriff's Police examined it.

Kandel's body had a bite mark inflicted on the inner thigh. A silicone impression and photographs of that bite mark were compared with Milone's dentition. After this comparison, Milone was formally charged with the murder of Sally Kandel. At trial this bite mark evidence was admitted as well as the expert testimony of numerous odontologists. The record contains over 1300 pages of dental testimony and numerous exhibits including photographs and impressions. *People v. Milone*, 356 N.E. 2d 1350, 1355 (Il. App. Ct. 1976).[1] Milone did not testify on his own behalf. The court found Milone guilty of murder and sentenced him to 90-175 years.

2) Procedural Background

Milone appealed to the Illinois Appellate Court and raised three issues: 1) whether the trial court ruled correctly on several grounds raised in support of the defendant's Mo-

[1] Information from the trial record has been obtained from the Illinois Appellate Court opinion (*People v. Milone*, 356 N.E. 2d 1350 (Il. App. Ct. 1976) and the Federal District Court Opinion *United States ex rel. Milone v. Camp*, 643 F. Supp. 679 (N.D. Ill. 1986) because the complete trial transcripts have been lost. The Seventh Circuit, in a similar situation where a trial record was absent in a petition for habeas corpus, looked to the Illinois Appellate Court decision to determine the procedural background. *Barksdale v. Lane*, 957 F.2d 379 (7th Cir. 1992).

tion to Suppress Evidence; 2) whether the trial court ruled correctly on several grounds raised in support of the defendant's Motion to Suppress Evidence; 2) whether the defendant was deprived of a fair trial by reason of the trial court's admission of bite mark evidence over the defendant's repeated objections; and 3) whether the defendant was proved guilty beyond a reasonable doubt. *Id.*

The Illinois Appellate Court held that Milone's constitutional rights were not violated when he was asked to give dental impressions which were later admitted at trial; that "nothing in the record indicated that the trial court abused his discretion in allowing the [bite mark] testimony; and that the evidence presented at trial was sufficient to support the trial judge's finding." *Id.* Illinois Supreme Court and certiorari was denied.

Since his conviction, Milone has obtained new expert opinions on the bite mark evidence which state that he could not have made the bite mark on the Kandel girl. Another man, convicted serial killer Richard Macek, later confessed to the Kandel murder. The new expert opinions linked the bite mark on the Kandel girl to Macek's unique dentition.

In 1986, Milone appealed to the federal district court for a writ of habeas corpus. The district court granted respondent's motion to dismiss. *United States ex rel. Milone v. Camp*, 643 F. Supp. 679 (N.D.Ill. 1986).

Milone filed a petition for Executive Clemency in 1986. An evidentiary hearing with the testimony of experts was presented by Milone to the Illinois Prisoner Review Board in the summer of 1986. After an investigation by the Illinois State Police, the Governor of Illinois concluded that Milone had not presented a compelling case of innocence.

Milone now petitions this court for a writ of habeas corpus on the ground that fundamental miscarriage of justice has occurred because he is innocent of the Kandel murder. Petitioner asserts that 1) Richard Milone is innocent; 2) Richard Macek confessed to the Kandel murder and the confessions are credible and probative of petitioner's innocence; 3) the bite mark evidence was not reliable and completely fails the *Frye* standard of admissibility of scientific evidence; 4) Linda Sue Roseboom reaffirmed her trial testimony that petitioner's Dodge Polara was not the car that she saw in her driveway the evening of the murder; 5) petitioner did not knowingly waive his write [sic] to allocution; 6) petitioner did not knowingly waive his right to testify in his own defense; 7) petitioner did not knowingly waive his right to a jury trial; 8) the State's failure to disclose all aspects of the Sally Kandel Award Fund violated petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments; 9) the handling of the petitioner's petition for Executive Clemency introduced error into the proceedings; 10) trial counsel effectively represented petitioner when they failed to call any of the 25 available character witnesses to testify in mitigation at sentencing; and 11) that the trial court's consideration of unreliable bite mark evidence violated Milone's right to both substantive and procedural due process.

Discussion

Before we can consider a state prisoner's petition for a writ of habeas corpus, we must consider federalism and comity concerns which require the petitioner to exhaust his available state remedies before seeing relief from the federal courts. 28 U.S.C. §2254. An application for "writ of habeas corpus . . . shall not be granted unless it appears that the applicant has exhausted the remedies avail-

able in the courts of the state. . . ." *Rose v. Lundy*, 455 U.S. 509, 517 (1982). The Court held in *Rose*:

> The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law. *See Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 490-491 (1973). Under our federal system, the federal and state 'courts [are] equally bound to guard and protect rights secured by the Constitution.' *Ex parte Royall*, 117 U.S. at 251. Because 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a doctrine of comity, which 'teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.' *Darr v. Burford*, 339 U.S. 200, 204 (1950)."

Id. at 1202. The applicable Illinois remedy for post-conviction relief is the Illinois Post Conviction Hearing Act, Ill. Rev. Stat. ch.38, ¶ 122-1 et seq. An issue which could have been raised on a direct appeal, but was not, is waived. *People v. James*, 263 N.E.2d 5 (Ill. App.Ct. 1970).

In 1986, Milone appealed to the federal district court for a writ of habeas corpus. The district court judge held that three claims which had been raised on direct appeal were exhausted. Three other claims were held to be unexhausted. The district court held that these issues "come squarely into the "fundamental fairness" exception to the [waiver] rule . . . and Milone must apply to the Illinois post-conviction courts before he is entitled to seek relief from a federal district court on those claims. *United States ex rel. Milone v. Camp*, 643 F. Supp. 679, 683 (N.D.Ill. 1986). The court was not persuaded that Milone was time-

barred from seeking post-convicted relief due to the running of the statute of limitations. The court rejected this argument because tolling was available to the petitioner for precisely this type of claim *Id.* at 683-84.[2]

However, the supreme court recently held:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider claims would result in a fundamental miscarriage of justice.

Coleman v. Thompson, 111 S.Ct. 2546 (1991).

A procedural default will be excused under the "fundamental miscarriage of justice" exception if a petitioner can demonstrate that a constitutional violation has probably

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[2] We are aware that the Seventh Circuit has held that the approach employed by the district court in *Milone* is "somewhat troublesome." *Harris v. DeRobertis*, 932 F.2d 619 (7th Cir. 1991). Referring in part to the 1986 district court opinion in *Milone*, the Seventh Circuit held that:

> the better approach is to forego resort to the Illinois post-conviction process if a petition would be untimely, absent judicial precedent indication that the culpable negligence standard would be met. Such a holding avoids the "merry-go-round procedure" noted in *Williams* by which prisoners are "shuttled back and forth between the state and federal courts before any decision on the merits is ever reached" in order to exhaust meaningless remedies.

Harris at 623-624 (citing *Williams v. Brantley*, 502 F.2d 1383 at 1386-87 (7th Cir. 1974)). We do not address *Harris*, however, in light of the Supreme Court's holding in *Coleman* which was decided six weeks after *Harris*.

resulted in the conviction of one who is "actually innocent."[3] *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Recently, the Supreme Court defined the "actual innocence" standard:

> to show actual innocence [of the death penalty] one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty.

Sawyer v. Whitley, 112 S.Ct. 2514, 2517 (1992). Although *Sawyer* was a death penalty case, at least one circuit has held since the decision that this standard also applies to habeas challenges of convictions. *Cornell v. Nix*, No. 90-1195 (8th Cir. July 10, 1992)).

Milone contends that the court should grant him his petition for habeas relief on the grounds that failure to do so would constitute a fundamental miscarriage of justice. Therefore, Milone must show by clear and convincing evidence that but for a constitutional error, no reasonable trial judge would have found him guilty of murder. *See Sawyer*, 112 S.Ct. at 2517.

Milone has presented a number of claims to prove his actual innocence. These include: 1) Kandel was not murdered by Milone; 2) Macek's confessions are credible and probative of Milone's petition; 3) the bite mark evidence was not reliable and fails the *Frye* test; 4) Linda Roseboom reaffirmed her trial testimony that the car she saw in her driveway that evening was not that of Milone; and 11) the trial court's admission of the bite mark evidence and

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[3] Because Milone has not alleged that cause exist for each of his defaults, we will not address that issue.

the appellate court's affirmance of the same violated Milone's substantive and procedural due process.

1) The Innocence Claims

Milone contends that he is innocent of the murder of Sally Kandel. We conclude, however, that a reasonable trier of fact could have found Milone guilty of murder and, therefore, reject this claim.

Milone's strongest argument is that the combination of the new bite mark testimony and the Macek confessions constitute newly discovered evidence which demonstrates Milone's actual innocence. Until recently, the standard used to evaluate newly discovered evidence was set forth in *Townsend v. Sain*, 372 U.S. 293, 313 (1963). In *Townsend*, the Supreme Court stated: "the existence merely of newly discovered evidence relevant to the guilt of the state prisoner is not a ground for relief in federal habeas corpus." *Id.*

The Supreme Court, however, overruled *Townsend* this year in *Keeney*. The Court stated:

> Respondent . . . is entitled to an evidentiary hearing if he can show cause for his failure to develop the facts in the state-court proceedings and actual prejudice resulting from that failure. We also adopt the narrow exception to the cause and prejudice requirement: a habeas petitioner's failure to develop a claim in state-court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice would result from the evidentiary hearing.

Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992).[4]

[4] Again, Milone does not allege cause and prejudice but relies solely on the fundamental miscarriage of justice argument.

In determining whether failure to grant an evidentiary hearing would result in a fundamental miscarriage of justice, we are bound by the standard set forth in *Jackson v. Virginia*: "[w]e must view all of the evidence in the light most favorable to the state, and determine whether, viewing the record as a whole, any rational trier of fact could have found the essential elements beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307 (1979).

At trial, the trial court judge reviewed over 1300 pages of bite mark evidence including photographs, dentition, and testimony. Experts appeared for both the state and the defense. The defense had an opportunity at trial to cross examine each expert as to the validity of his or her opinion. The Appellate Court of Illinois has already held that the trial judge did not abuse his discretion by admitting the bite mark evidence.

The bite mark testimony of Milone's new expert, Dr. Campbell, would merely be one more expert opinion added to the numerous opinions before the court. Rather than changing the outcome of the decision, it would be merely cumulative evidence. The undesirable result of allowing a habeas petitioner to be granted a writ each time a new expert can add a "better" opinion than those presented at trial would lead to endless litigation and certainly thwart the court's concern with the finality of judgments.[5] Therefore, we conclude that the absence of Dr.

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[5] Although Milone has alleged that the bite mark evidence presented by Dr. Campbell was created by means of "analog image enhancement" which was not available at Milone's trial; this technology was available in late 1974, well within the post conviction statute of limitations. Yet, Milone never presented this new technology claim to the post-conviction state courts. Milone also has not presented any argument that this enhancement technique improves the error rate of dentition examinations.

Campbell's testimony at trial did not constitute a fundamental miscarriage of justice.

Milone further alleges that the trial record reveals that Lisa Roseboom never identified Richard Milone as the man who drove the car and that she only identified a car that was similar to Milone's. Roseboom later stated after trial that if she had been shown a picture of Milone's car, she certainly would have said that it was NOT the car she saw in her driveway on the night of the murder. Milone alleges this is recantation testimony which would have resulted in a different outcome of the trial. We disagree.

First, the testimony of Roseboom was also subject to cross examination at trial. Failure to illicit a "better" answer than the one given in the trial does not constitute a constitutional violation. Aside from any allegations of ineffective counsel (which we will address later) failure of defense counsel to illicit the answers which are in Roseboom's affidavit and which are now presented to this court years later, does not constitute a fundamental miscarriage of justice.

In a similar case before the Seventh Circuit, *Shore v. Warden, Stateville Prison*, the court held that a witness' partial recantation of trial testimony was not sufficient to grant habeas relief. *Shore v. Warden, Stateville Prison*, 942 F.2d 1117 (7th Cir. 1991). In *Shore*, the court looked to whether the recantation was substantially different from her trial testimony and whether the testimony was central to the decision in the case. Finding that the testimony was not eyewitness testimony, was only partially recanted and was merely corroborative of events surrounding the murder, the court found this newly discovered evidence to be insufficient to grant habeas relief. *Id.* at 1124.

The facts of *Shore* are remarkably similar to the case at hand. Roseboom was not an eyewitness to the murder, her new testimony has not completely changed, rather it has been clarified, and it is merely corroborative of events surrounding the murder. We, therefore, hold that the recantation is not sufficient to grant habeas relief.

Furthermore, the Illinois Appellate Court upheld the conviction of Milone stating that there was sufficient evidence to support the conviction from the following findings:

> 1) the murder weapon came from Milone's workplace; 2) Milone admitted that he had possession of a shopping cart handle after having first denied having possession of it; 3) Milone admitted that he had left work at the time of the murder after having initially denied having left; 4) Milone changed his clothes and lied to co-workers about his delay and absence, and 5) that a car similar to petitioner's was seen near the murder scene drive by a man who, like Milone, had very long sideburns.

People v. Milone, 356 N.E.2d 1350 (N.D.Ill. 1976). The court found that this evidence "alone is sufficient to support the trial judge's finding." *Id.* Therefore, even without addressing the disputed bite mark evidence, the Illinois appellate court found that the evidence was sufficient to support the conviction.

Milone further alleges that a fundamental miscarriage of justice occurred because subsequent to his conviction, another man, Richard Macek, confessed to the Kandel murder. Applying the standard in *Jackson v. Virginia*, 443 U.S. 307 (1979) we fail to find that the confessions by Macek would have altered the outcome of the trial. Because Macek was convicted of other murders, his confessions frequently were given to his doctor, and at one point

were recanted, the trial judge would have weighed the credibility of these confessions along with the other evidence.[6] Under the *Jackson v. Virginia* standard, the trial judge could have come to the same conclusion; and therefore, no fundamental miscarriage of justice occurred.

2) The Counsel Claims

The second category of claims can be grouped according to Milone's allegations of ineffective counsel. These include: 5) petitioner did not knowingly waive his right to allocution; 6) petitioner did not knowingly waive his right to testify in his own defense; 7) petitioner did not knowingly waive his right to a trial by jury; and 10) trial counsel ineffectively represented petitioner by failing to call character witnesses to testify in mitigation.

In determining if ineffective counsel has adversely affected a petitioner's rights, the Supreme Court in *Strickland* held:

> [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of alleged deficiencies. The object of an effective claim is not to grade counsel's performance. If it is earlier to dispose of an effectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Strickland v. Washington, 466 U.S. 668, 697 (1984).

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[6] Although the narrow "fundamental miscarriage of justice" exception allows a petitioner to present his claims to the court even after procedurally defaulting, it is important to note that these confessions were made within the statute of limitations period for which Milone could have appealed to the post-conviction courts.

To show prejudice, "[t]he defendant must show that here is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In addition, the Seventh Circuit has held: "[i]f an issue which was not raised may have resulted in a reversal conviction, or an order for a new trial, the failure was prejudicial." *Gray v. Greer*, 800 F.2d 644 (7th Cir. 1985).

Milone alleges that he did not knowingly waive his right to allocution. Although the Supreme Court has held that the defendant has a right to testify in his or her own defense, the Court has never held that the defendant has constitutional right to allocution. *See Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987). Although Illinois recognizes that it is "better practice" to allow defendant the opportunity to address the court; it is not a ground for reversal. *Gannon v. People*, 127 Ill. 507, 521, 21 N.E. 525 (1889). Therefore, no fundamental miscarriage of justice occurred when Milone did not make a personal statement to the court.

Milone next alleges that he did not knowingly waive his right to testify. The Seventh Circuit has held that "courts have no affirmative duty to determine whether a defendant's silence is the result of a knowing and voluntary decision not to testify." *U.S. v. Brimberry*, 961 F.2d 1286, 1290 (7th Cir. 1992). Therefore, a fundamental miscarriage of justice did not occur when Milone waived this right to testify.

Milone next alleges that he did not knowingly waive his right to jury trial. Yet, petitioner states in his brief that "he and his parents were advised by trial counsel to waive

a jury for two reasons: that it would be easier to prevail on appeal; and that a jury would have difficulty in understanding the expert testimony." (Petitioner's Memorandum in Support of Issuance of the Writ of Habeas Corpus, p. 24.) Therefore, in his own admission, petitioner was informed of the waiver of trial by jury and the reasons supporting that decision. We fail to find a fundamental miscarriage of justice occurred under those circumstances.

Finally, Milone alleges that he has ineffective counsel due to the fact that no mitigation witnesses were called to testify in his behalf. Although the court finds this situation to be exceptional, we do not find that fundamental miscarriage of justice occurred. Once again, there is no constitutional right to have mitigation witnesses testify and any claims of ineffective counsel must be analyzed under The Supreme Court's standard delineated in *Strickland v. Washington*, 466 U.S. 668 (1984).

The facts of the murder were presented to the trial judge. The trial court had the opportunity to access not only the bludgeoning death but also the bite mark, the slits in the girl's eyes, the age of the victim, and all available evidence. We fail to find that the sentence of 90 to 175 years would have been different if the defense would have presented witnesses to testify on behalf of Milone. We do not find a fundamental miscarriage of justice occurred in the defense counsel's failure to call character witnesses on Milone's behalf.

3) The Kandel Award Fund

Milone next alleges that his constitutional rights were violated because the State failed to disclose "all" aspects of the Sally Kandel Award Fund. Under the Supreme Court's decision in *Brady v. Maryland:*

> [T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.

Brady v. Maryland, 373 U.S. 83, 87 (1963). The Court later defined materiality in *Bagley* holding that:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Bagley at 684. There has been no evidence presented to this court that the state, prior to each witness' testimony, either induced, made promises to, or cut deals with the witnesses. *See United States v. Bagley*, 473 U.S. 667 (1985). Instead, the exhibits demonstrate the opposite—the funds were distributed *after* the conviction of Milone and shares were determined by Kandel's father. Furthermore, defense counsel could have probed into any bias that each witness may have had on cross-examination and his failure to do so does not constitute error.

We fail to find that Milone's constitutional rights were violated by the administration of the Sally Kandel Award Fund. Because counsel would have been able to cross examine the witnesses at trial, and the fund was not distributed until after his conviction, it is likely that bias would not have been shown, specifically because the witnesses had not idea at trial which of them would be awarded any funds. For this reason, we find that the outcome of the trial would not have been different and no fundamental miscarriage of justice occurred.

Milone's final claim is that the petition for clemency and the hearing which followed has introduced further error

into these proceedings. Because the Governor's decision and our decision are completely unrelated and have no effect on each other, and because this does not present a constitutional claim to this court, we do not find that a fundamental miscarriage of justice has occurred due to the Governor's proceedings.

In conclusion, because we fail to find that a fundamental miscarriage of justice occurred after thoroughly examining the facts surrounding this case, we deny Milone's petition for a writ of habeas corpus and grant respondent's motion to dismiss.

ENTER:

GEORGE M. MAROVICH
United States District Judge

Dated: (Sept. 29, 1992)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 85 C 10098 Date: September 29, 1992

Name of Assigned Judge: George M. Marovich

Case Title: U.S. ex rel. RICHARD MILONE
v ALTHEA CAMP

* * * * * *

DOCKET ENTRY:

* * * * * *

(10) ☒ [Other docket entry] The petition for a writ of habeas corpus is denied and respondent's motion to dismiss is granted.

(11) ☒ For further detail see ☒ order attached to the original minute order form.]

* * * * * *

App. 40

[Received October 8, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA
ex rel. RICHARD MILONE,

Petitioner,

v.

ALTHEA CAMP, WARDEN, GRAHAM CORRECTIONAL CENTER, ILLINOIS DEPARTMENT OF CORRECTIONS,

Respondents.

No. 85 C 10098 — Judge George Marovich

NOTICE OF APPEAL

Notice is hereby given that RICHARD MILONE, relator-petitioner above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final order and judgment dismissing his petition for writ of habeas corpus entered September 29, 1992.

/s/ JOHN THOMAS MORAN, JR.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA
ex rel. RICHARD MILONE,

Petitioner,

v.

ALTHEA CAMP, Warden, Graham Correctional Center,
Illinois Department of Corrections,

Respondents.

No. 85 C 10098 — Judge George M. Marovich

CERTIFICATE OF PROBABLE CAUSE

Pursuant to Federal Rules of Appellate Procedure 22(b) the district court certifies that Richard Milone had probable cause to appeal this court's September 29, 1992 order denying him a writ of habeas corpus. Rule 22(b) provides that an applicant for writ may not proceed unless the district court issues a certificate of probable cause or states the reasons why such certificate should not be issued. Therefore, we hereby grant Milone's request for a certificate of probable cause.

ENTER:

/s/ George M. Marovich
United States District Judge

DATED: November 4, 1992

Court, U.S.
FILE
DEC 7 1994
OFFICE OF THE CLERK

(2)

No. 94-138

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RICHARD MILONE,

Petitioner,

v.

ALTHEA CAMP, Warden,
Graham Correctional Center, Illinois
Department of Corrections,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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12 pp

QUESTION PRESENTED

1. Does a free-standing claim of actual innocence entitle a non-capital state prisoner to federal habeas corpus relief?

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No. 94-138

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RICHARD MILONE,

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Graham Correctional Center, Illinois
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

The State of Illinois asks this Court to deny the Petition for a Writ of Certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit, entered April 21, 1994, insofar as petitioner does not raise an issue worthy of review.

OPINION BELOW

The opinion below is cited as *Milone v. Camp*, 22 F.3d 693 (7th Cir. 1994). A copy of the opinion is included in petitioner's appendix.

STATEMENT OF THE CASE

Petitioner, Richard Milone, seeks review of a judgment affirming the denial of a petition for a writ of habeas corpus that held that petitioner's conviction and sentence were constitutionally imposed.

Procedural Background

In 1973, petitioner was tried and convicted in the Circuit Court of DuPage County, Illinois, for the murder of fourteen-year-old Sally Kandel. His conviction was affirmed on direct appeal. *People v. Milone*, 43 Ill. App. 3d 385, 356 N.E.2d 1350 (2d Dist. 1976). The Illinois Supreme Court denied leave to appeal, and no petition for a writ of certiorari to this Court was sought.

In 1986, petitioner filed his first petition for a writ of habeas corpus. The district court initially granted the State's motion to dismiss, reasoning that petitioner was required to first exhaust his state remedies. *United States ex rel. Milone v. Camp*, 643 F.Supp. 679 (N.D. Ill. 1986).

Petitioner then filed an amended petition raising only the issues he had previously presented to the Illinois appellate court. (App. at 5) The federal proceedings were then stayed while petitioner pursued executive clemency, which was denied. *Id.* Petitioner was then allowed to present all of his original habeas claims, both exhausted and unexhausted, under the theory that petitioner "had made a good case for relaxation of the total exhaustion rule." *Id.* In 1992, the district court dismissed the petition.

On appeal to the United States Court of Appeals for the Seventh Circuit, petitioner's arguments "center[ed] around the claim that he [was] actually innocent of the crime of which he was convicted." (App. 6) Relying on this Court's holding in *Herrera v. Collins*, ____ U.S. ____, 113 S.Ct.

853, 862 (1993), the Seventh Circuit noted that "actual innocence" was not a cognizable habeas claim in and of itself. Rather, it provides " 'a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.' " (App. 7, quoting *Herrera*.) Next, the Court of Appeals noted that although under its reading of this Court's precedent, it would be contrary to the Constitution to execute a legally and factually innocent person, such an extension of the concept of "actual innocence" was not applicable to this petitioner, who had not received the death penalty and was in fact released on parole. (App. 7-8) Consequently, the court below examined the actual innocence claim solely in terms of whether it could excuse petitioner's failure to exhaust his state remedies before pursuing habeas relief. (App. 8) The court noted that the parties disagreed as to the threshold standard required to demonstrate actual innocence, and then refused to determine whether in fact petitioner met either standard, deciding instead that it was more efficient to review petitioner's constitutional claims, which it deemed without merit, than to engage in a long analysis of his factual claims under either standard propounded by the parties. (App. 10) The court below held:

> The remainder of this opinion is premised on the assumption that Milone has made a sufficient showing of actual innocence to warrant habeas review of all of his constitutional claims, unexhausted as well as exhausted.

(App. 10).

The court below then proceeded to examine petitioner's five constitutional claims, including a challenge to the sufficiency of the evidence. (App. 11) The court refused, however, to consider additional claims connected to his "ac-

tual innocence" argument. (App. 11-12) As to the sufficiency of the evidence claim, when examining the record evidence, the court below found that under *Jackson v. Virginia*, 443 U.S. 307 (1979), the evidence presented at trial was sufficient to support his conviction. (App. 14) Similarly, the court rejected the petitioner's other claims and in concluding, stated:

> [W]e are unable to accept Milone's invitation to engage in a broad inquiry into his guilt or innocence. Our interpretation of applicable Supreme Court precedent and of the policies underlying habeas review precludes such a proceeding. First, *Herrera* strongly suggests that actual innocence is not itself a ground for granting habeas relief in anything other than a capital case, 113 S.Ct. at 860, thus implicitly overruling federal cases suggesting otherwise. In addition, a contrary rule would gravely undermine legitimate concerns for federalism and finality by arrogating to federal courts, under the guise of a constitutional claim to substantive due process, the fact-finding function that is generally reserved for state processes.

(App. 19).

This petition followed.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S FREE-STANDING CLAIM OF ACTUAL INNOCENCE DOES NOT ENTITLE HIM TO FEDERAL HABEAS RELIEF, AND CONSEQUENTLY PROVIDES NO GROUND TO ISSUE A WRIT OF CERTIORARI.

Petitioner first contends that the writ of certiorari is justified in order "to decide whether or not a 'free standing' claim of actual innocence provides a basis for federal habeas review." (Petition at 10-14) Just last term, this Court answered that question in the negative in *Herrera v. Collins*, ____ U.S. ____, ____, 113 S.Ct. 853, 862 (1993). That case makes clear that a claim of "actual innocence" is not itself a constitutional claim, "but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* In fact, the Court held:

> The fundamental miscarriage of justice exception is available only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence. We have never held that it extends to free-standing claims of actual innocence.

Id. at ____, 113 S.Ct. at 862-63. (internal quotation marks, citation and emphasis omitted) Moreover, although in that case the Court assumed in the alternative that in a capital case a truly persuasive demonstration of "actual innocence" occurring after trial would render the execution of a defendant unconstitutional, thus justifying federal habeas relief, *id.* at ____, 113 S.Ct. at 869, this non-capital petitioner, already serving the remainder of his sentence on parole, may not avail himself of that language to justify certiorari.

The Seventh Circuit's opinion recognizes and adheres to both aspects of this Court's "actual innocence" jurispru-

dence: First, that the concept is not an independent ground for federal habeas relief, but instead functions only as a means for a petitioner to present defaulted, successive or abusive claims in a federal forum. *Cf. Sawyer v. Whitley*, ___ U.S. ___, 112 S.Ct. 2514 (1992). Second, even if "actual innocence" could stand alone as a self-supporting justification for the writ of habeas corpus, it would assume such a status only in the context of a capital case where the defendant was bereft of a state avenue open to process such a claim. *Herrera, supra.*[1]

Other aspects of the decision below militate against granting the writ of certiorari. First, the court declined to resolve whether in fact petitioner convincingly demonstrated his actual innocence so as to warrant habeas review of his unexhausted claims. (App. 10) Instead, the Court of Appeals disposed of the claims on the merits, finding it "more efficient" to reach the claim than engage in a "long analysis" of the factual claims under either the *Kuhlmann* or *Sawyer* standards. *Id.* The court below then held:

> The remainder of this opinion is premised on the assumption that Milone has made a sufficient showing of actual innocence to warrant habeas review of all of his constitutional claims, unexhausted as well as exhausted.

The opinion below is in perfect accord with the letter and spirit of this Court's habeas jurisprudence, which has

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[1] The most recent case considered by the Court also involves a capital case. *Schlup v. Delo*, 93-7901. Moreover, that case involves the question of which standard must be met by a habeas petitioner attempting to demonstrate his or her actual innocence: the "colorable claim" noted in *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986), or the "clear and convincing" standard contained in *Sawyer v. Whitley*, ___ U.S. ___, 112 S.Ct. 2514, 2517 (1992).

reaffirmed the importance of the guilt or innocence determination in state criminal trials. *Herrera*, ____ U.S. at ____, 113 S.Ct. at 861, citing *Barefoot v. Estelle*, 463 U.S. 880 (1983) and *Wainwright v. Sykes*, 433 U.S. 72 (1977). That determination, at the state level, is a "decisive and portentous event." *Id.* Indeed, the trial is "the paramount event for determining the guilt or innocence of the defendant." *Id.* at 869. This Court also recognized in *Herrera* that "[f]ew rulings would be more disruptive of our federal systen than to provide for federal habeas review of free-standing claims of actual innocence." *Id.* at 861.

The Court below issued an opinion that respects the primacy of the state system in the guilt phase of a state criminal trial, and petitioner makes no convincing argument that would justify the abandonment of the doctrines of comity and finality that have for so long guided and shaped this Court's habeas caselaw. Moreover, since the court below did not reach the question of which standard was appropriate to determine whether petitioner had made the requisite showing of actual innocence, (App. 10), the issue of whether an evidentiary hearing is required in order to aid that determination is not properly before the Court. (Pet. 15) Alternatively, if petitioner is asserting a right to an evidentiary hearing as a means of demonstrating his free-standing claim of actual innocence, his inability to maintain such a claim on habeas renders the question moot. Moreover, Illinois' time limitation on the ability to present newly discovered evidence does not, contrary to petitioner's contention (Pet. at 15), alter the scenario. This Court implicitly approved an identical time frame in *Herrera*, where it noted that Texas, like Illinois, requires a new trial motion based on newly discovered evidence to be made within 30 days of judgment. *Herrera*, ____ U.S. at ____, 113 S.Ct. at 865, n. 8. Such a requirement was deemed not to transgress rooted principles of

fundamental fairness. *Id.* at 866. That being the case, petitioner has no right to an evidentiary hearing on habeas in order to present his dilatory and defaulted claims.

Petitioner's conviction and sentence were imposed and reviewed in a manner consistent with the precepts of the Constitution. There is no reason for this Court to intervene.

CONCLUSION

WHEREFORE, Respondent asks this Court to deny the petition for writ of certiorari in this cause.

Respectfully submitted,

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